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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1538

WILLIAM E. BARTH, - - - - Petitioner,

versus

CITY OF LOUISVILLE, a Municipal Corporation;
ELI BROWN & SONS, INC.; and
D. H. ROBINSON and E. F. RECTENWALD, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY, AND TO THE JEFFERSON CIRCUIT COURT, IN LOUISVILLE, KENTUCKY, WHERE THIS ACTION IS NOW PENDING.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY, AND TO THE JEFFERSON CIRCUIT COURT, IN LOUISVILLE, KENTUCKY, WHERE THIS ACTION IS NOW PENDING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, William E. Barth, an owner for forty-seven years of land abutting upon an alley in Louisville, Kentucky, and of specific property rights, private in nature, in said alley, which was dedicated and conveyed in trust for the Town of Louisville, in October, 1817, prays for a Writ of Certiorari to review the Opinion and Order of the Court of Appeals of Kentucky, which became final in said Court on February 6,

1970, affirming a Judgment of the Jefferson Circuit Court, entered October 2, 1968, directing that a portion of said alley "shall be closed and the area embraced in said portion of subject alley shall revert to the adjoining landowners," and to remand this action to said circuit Court with direction to continue the existing public use of said alley.

Any Order entered by this Court should be directed to said Circuit Court, because the Judgment of said Court directs further action in that Court in determining any damages to be paid.

OPINIONS OF THE STATE COURTS.

This action was started on October 17, 1966. The City of Louisville had passed an ordinance a few days before to start proceedings for closing certain designated alleys in the City of Louisville. The Complaint in this action involves only the alley listed in the last paragraph of said Ordinance (No. 183, Series 166) with the alley described as follows:

> "The first alley south of Liberty Street on the east side of Fifth Street for a distance of 116 feet running eastwardly."

A copy of said Ordinance is included in the list of Constitutional Provisions, Statutes and Ordinances involved herein.

The Kentucky Legislature has classified Kentucky cities in six separate groups, according to size, with the City of Louisville being the only city placed in the first class. Chapter 93 of the Kentucky Revised Statutes

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relates to Public Works in cities of that class. Section 93.360 KRS has the title: "Public ways; dedication; action to close." The particular legislative section, presumably in effect in October, 1966, had been enacted by the Kentucky Legislature at the 1966 session, held in January to March, 1966. The Act was published as Chapter 242 of the 1966 Kentucky Acts, and, if constitutional, became effective June 16, 1966. A copy of said Act is included in the paragraph hereof, entitled "Constitutional Provisions, Statutes, Ordinances."

In this action the Chancellor requested each of the property owners defending to file separate Motions for Judgment. In overruling two of these Motions, the Chancellor wrote an Opinion dated May 1, 1968 (not officially reported). The Chancellor noted the fact that the City of Louisville had added numerous Defendants who did not object to closing the alley. The Opinion did not mention that adding all but four of these tracts was not pertinent, because the particular tracts did not abut on the East-West Alley. The Opinions in Henderson v. City of Lexington, 132 Ky. 390, 33 K.L.R. 703, 111 S. W. 318 (1908), and Riedling, *et al.* v. Harrod, *et al.*, 298 Ky. 232, 182 S. W. 2d 770 (1944), had clarified the law in Kentucky to the effect that, only owners whose property actually abutted on the alley in the block where a part was sought to be closed, were necessary or proper parties. A copy of said Opinion is included in Appendix A as Item 1.

A map showing the full length of the East-West Alley and the various lots (seven) abutting thereon, was filed in evidence in this action by Mr. Albert

Hartell, a title abstractor, and is included in said Appendix A as Item 2.

Interrogatory No. 17 addressed by Petitioner to Respondent, City of Louisville, is included in Appendix B as Item 1. The answer of said Respondent to Interrogatory No. 17 is also included in Appendix B as Item 2. Interrogatory No. 6, addressed by Petitioner to Respondent Eli Brown and Sons, Inc. is included in Appendix B as Item 3. The response of said Respondent to Interrogatory No. 6 is also included in Appendix B as Item 4.

The Findings of Facts and Conclusions of Law made by the Chancellor, filed in Court on September 17, 1968 after two days oral hearings, are included in Appendix C as Item 1 (not officially reported). A Motion filed by Petitioner, William E. Barth, on September 26, 1968, to strike several specific parts of this Opinion, as irrelevant to issues as to alley closing, upon the face of which Motion the Chancellor wrote the word "Overruled", on October 3, 1968, without hearing argument or briefs, is also included in Appendix C as Item 2.

A copy of the Final Judgment entered October 2, 1968 is included in Appendix D as Item 1. A copy of an Amended Judgment entered in Court on October 24, 1968 is also included in Appendix D as Item 2. The decision of the Chancellor was affirmed by the Kentucky Court of Appeals in an Opinion rendered November 21, 1969. A copy of this Opinion is included in Appendix D as Item 3.

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The Court of Appeals' Opinion discussed property ownership of the lots abutting on the East-West Alley, with a conditional trade, apparently oral, that the alley would not be closed unless Eli Brown and Sons, Inc. paid all relocation costs of public utilities to other property abutting on the East-West Alley, when no such authority was granted to the Board of Aldermen, when trading for land under option, and the pleadings in this action involve only alley closings. Such a contract, if effective, would place all other abutting owners on the East-West Alley as conditionally entitled to a partial award "provided that Eli Brown and Sons, Inc. shall bear the cost of relocating all public utilities which service the objecting defendants."

The Opinion of the Kentucky Court of Appeals was rendered November 21, 1969. A Petition for Rehearing was filed by Petitioner, William E. Barth, in the Court of Appeals on the 19th day of December, 1969. The Court of Appeals on February 6, 1970 overruled the Petition for Rehearing. A copy of the Court's record of this action is in Appendix D.

JURISDICTION.

The jurisdiction of the Court is based on Title 28, U. S. Code, Section 1257(3). This action, as filed in 1966 named only one defendant, Eli Brown and Sons, Inc., which owns the land on both sides of the East-West Alley for a disance of 116 feet east of Fifth Street. That Defendant promptly entered its appearance and a judgment was entered immediately closing the alley. That step was erroneous, in that it followed

a Court of Appeals' interpretation of the alley closing statute in effect in 1908. Haller, *et al.* v. City of Louisville, 107 S. W. 741, 32 K.L.R. 1045. This legal error controlled the Jefferson Circuit Court decision in the action of City of Louisville v. R. D. Riedling filed in the Jefferson Circuit Court in December, 1941. The Haller Opinion in 1908 had interpreted a 1902 amendment to Section 2832 of Carroll's Kentucky Statutes (later renumbered as Section 93.360 KRS).

The Kentucky Court of Appeals in the Haller case had interpreted the closing statute before 1902 to require "all the owners of ground in the square to be made defendants to the action." The Jefferson Circuit Court in the case of City of Louisville v. R. D. Riedling followed the Haller interpretation directly. Harrod and others whose property abutted University Avenue later brought an injunction suit to prevent Riedling from blocking University Avenue. Riedling pleaded the orders in the City's case against him. The Chancellor, in the Harrod case, then sustained a demurrer to the Riedling plea, upholding the Harrod position. In thus ruling the Court of Appeals in Riedling, *et al.* v. Harrod, *et al.* (1944), 298 Ky. 232, 182 S. W. 2d 770, said in part (pp. 236-7):

> "Undoubtedly, the construction which the Court placed on the original act was sound; but the construction which it placed on the amendment does not admit of such prompt and unqualified approval. A comparison of the language of the original act with that of the amendment reveals that under the former any person who owned property

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located anywhere within the block affected was a necessary party to an action to close any part of the street; whereas, under the latter a property holder within the block is not a necessary party to such action unless some portion of his property actually abuts on the street. By no process of sound reasoning can the amendment be construed as restricting the necessary parties to such action to those persons only who own property which abuts simply on that portion of the street which is sought to be closed."

As to the distinction between the Haller interpretation and the Henderson Opinion as to necessary parties, the Riedling Opinion says (p. 238):

> "It being the view of this Court that not only is the opinion in the Henderson case the sounder of the two, but that it also correctly interprets the legislative will, the opinion in the Haller case is now overruled."

By referring to the map filed as Item 2 of Appendix B, it is evident that the only additional parties proper in this action were those whose land abutted on the north side of the subject East-West Alley.

It seems particularly important at this point to mention specifically the property interests which the Courts recognize as important for protection of legal rights. In the case of Lexington and Ohio Railroad v. Applegate, etc., 38 Ky. (8th Dana), 289 (1939), Chief Justice Robertson said (p. 294):

> "The streets of Louisville were designated, not only for subserving the public purposes for which

> the town was established by law; but also, for the especial convenience and enjoyment of such persons as should purchase and hold lots contiguous to them. The title to such lot carries with it, as essential incidents, certain services and easements, not only valuable and almost indispensable, but as inviolable as the property in the lots themselves. And therefore, the owners and occupants of houses and lots on Main street, between Sixth and Thirteenth, have a peculiar interest in that street, which neither the local nor general public can pretend to claim—a private right of the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain facilities and franchises assured to them by contract and by law, without which their property would be comparatively of but little value, and would never have been bought by them."

Property rights of the same nature are specifically designated in the decree of the Fayette Circuit Court, which was affirmed in Transylvania University v. City of Lexington, 42 Ky. (3 B. Mon.) 25. The decree included the following pronouncement (p. 27):

> "Every owner of ground on any street in Lexington, has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right, the Legislature cannot deprive him, without his consent, or a just compensation in money. The extent of this appurtenant right, depending on circumstances, may not, in a particular

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case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law, as property. But it cannot, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private right, it must, like that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of convenient access to, and outlet from the ground of each proprietor."

QUESTIONS PRESENTED FOR REVIEW.

I. As interpreted by The City of Louisville, Respondent herein, Subsections (2) and (3) of Section 93.360 are unconstitutional, because said subsections conflict with Sections 13 and 242 of the Constitution of the Commonwealth of Kentucky and with the Fourteenth Amendment to the Constitution of the United States of America.

II. At the conclusion of evidence in the trial of this action before the Chancellor, Respondents Robinson and Rectenwald and Petitioner William E. Barth filed Motions for Dismissal of the City of Louisville's action to close a portion of an existing alley, based on evidence and an interrogatory response that the portion of the alley sought to be closed would, if closed, be relieved of any public service.

III. This is an action brought under the provisions of Subsection (2) and (3) of Section 93.360 KRS. It is a phase of the principle of eminent domain. In an action to condemn land, the owner is entitled to compensation in cash. The Judgment rendered in this

action on October 2, 1968, did not, and does not, provide all compensation in cash, leaving responsibility upon a person other than the condemnor as to indefinite expense and indefinite time for replacing present utility connections with specified utility lines.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

Statute authorizing Action to Close Alley Section 93.360 (2) and (3) KRS:

(2) "Upon the adoption of an ordinance by the city legislative body closing the whole or any portion of a public way, the city attorney shall institute an action in the circuit court to have it closed. All the owners of ground in the square or lots divided by that public way, or the portion proposed to be closed, shall be made defendants."

(3) "If all defendants are competent to act for themselves and fail to object to the closing prayed for, the court shall render a decree accordingly, but if any defendants object, or are under disability other than coverture, the court shall impanel a jury, which shall hear evidence and determine the amount of compensation in the form of damages to be paid to each defendant. The court shall then direct that the public way be closed upon payment to each defendant of the damages awarded to him, or, if any defendant refuses or is unable to accept payment, upon payment into court of the amount awarded that defendant. The court shall give these proceedings precedence over other cases."

Louisville City Ordinance No. 183, Series 1966:

ORDINANCE No. 183 SERIES 1966

AN ORDINANCE AUTHORIZING THE INSTITUTION OF AN ACTION IN THE JEFFERSON CIRCUIT COURT FOR THE PURPOSE OF CLOSING CERTAIN ALLEYS IN THE CITY OF LOUISVILLE, AS SET FORTH BELOW.

Be it Ordained by the Board of Aldermen of the City of Louisville:

THAT, an action be instituted in the Jefferson Circuit Court for the purpose of closing the following as public ways of the City of Louisville:

The 18′ alley 135′ west of Veenia Avenue from Taylorsville Road north 322′ to a 15′ alley.

The 20′ alley from Floyd Street to a line 118.5′ East, said alley is located 180′ South of St. Catherine Street.

All alleys in the block bounded by Jackson, Preston, Jefferson Streets and Fehr Avenue.

The first alley South of Liberty Street on the East side of Fifth Street for a disance of 116 feet running Eastwardly.

Plats showing the location of said alleys are attached hereto and made a part hereof.

/s/ Ruby Merhoff, C.B.A.
Approved Oct. 12, 1966

/s/ John W. Young, P.B.A.
/s/ Kenneth A. Schmied, Mayor

FILED WITH COMPLAINT
Oct. 17, 1966
Elmer N. Carrell, Clerk
By Ruby E. Wilder,
Deputy Clerk.

EXHIBIT 'A"

CERTIFICATE

I, Cal M. Sandman, Director of Finance of the City of Louisville, Kentucky, and by virtue of Kentucky Revised Statutes, Section 91.060, custodian of Ordinances and Records of the City of Louisville, do this 13 day of October 1966 hereby certify that the foregoing is a full and true copy of an Ordinance of the City of Louisville, as approved October 12, 1966.

/s/ Cal M. Sandman
Director of Finance
City of Louisville

U. S. Constitution, Fourteenth Amendment, Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Constitution, Section 242:

"Just compensation to be made in condemning private property; right of appeal; jury trial. Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary

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assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

Condemnation by City of the First Class Section 93.100 (1) and (2):

"Acquisition of property for use of city; condemnation. (1) Except as provided in KRS 93.320, when property is needed for appropriate municipal purposes, within the boundaries of the city or the county in which the city is located, the director of works may, with the consent of the mayor, if the amount is under two thousand dollars, or with the consent of the mayor and the city legislative body, if the amount is over two thousand dollars, order the condemnation of the property.

"(2) The proceeding for the condemnation shall be prosecuted in the name of the city by the city attorney in the manner provided in KRS 416.120."

Section 416.120 Kentucky Revised Statutes (2852) Park purposes; condemnation for, in cities of first class. This portion is quite lengthy. It is included in Appendix D as Item 5.

Conveyance of Real Estate, Section 65.010 Kentucky Revised Statutes:

"Conveyance of real estate. Any city or county may sell and convey any real estate owned by it upon a determination by the legislative body of

such governmental unit that said real estate is no longer needed to carry on the governmental functions of the city or county or that other property is more suitable for the governmental purpose to which the property to be sold and conveyed has been dedicated. The city or county may make such disposition of its property regardless of a previous dedication of said property whether the dedication was created by virtue of use, deed, ordinance or by any other manner. This section shall not apply to any public street, sidewalk, right-of-way or other easement. (1958, c. 21)"

STATEMENT OF THE CASE.

This action was filed by the Respondent, City of Louisville, under the provisions of a Kentucky Statute entitled "Public Ways; dedication; action to close." Subsections (2) and (3) of this Statute (Section 93.360 Kentucky Revised Statutes) provide for certain court action, included under the power of eminent domain, which is defined in Volume 3 of Nichols on Eminent Domain as the power of the sovereign to take private property for public use without the owner's consent.

In this action the owners are all persons owning land facing on the south side of Liberty Street in Louisville, Kentucky, which abuts on the north side of the first alley south of Liberty Street on the east side of Fifth Street.

Respondent, City of Louisville based this action on Ordinance No. 183, Series 1966 which directed that an action be instituted by the City for the purpose of closing alleys described in four separate paragraphs. This

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includes only the last of the four paragraphs, which reads as follows:

> "The first alley South of Liberty Street for a distance of 116 feet running Eastwardly."

The prayer of the Complaint itself then reads as follows:

> "Wherefore, Plaintiff demands that said public way be closed and that the area embraced therein revert to Eli Brown and Sons, Inc., . . .".

The map filed in evidence by Mr. Hartell as Barth Exhibit No. 2 shows that the designated East-West Alley is only a half block in length. This made necessary the inclusion of the owners of all the lots abutting on the East-West Alley as parties to this action. This is expressly required by the Henderson and the Riedling Opinions cited *supra*.. When the City filed its Amended Complaint adding the owners of four other lots abutting on the north side of this alley (and numerous other lot owners abutting on another alley) it included in said Amended Complaint the following paragraph:

> "Plaintiff states that the closing of said portion of the public way will be beneficial to the City of Louisville and not injurious to any defendant herein."

The maps filed in this action show directly that Petitioner's lot is the nearest lot to the Eli Brown and Sons, Inc. corner lot on the north side of the East-West Alley, and, if the West 116 feet of that alley is

closed off, Petitioner's lot will be completely deprived of direct access to and from Fifth Street and be at the dark end of a blind alley.

It is most significant that Respondent, City of Louisville, made no reference in any pleading to any legal proceeding other than the closing of part of an existing designated alley, and said Respondent made no statement whatever in any pleading as to any public use which it would expect to make of the closed or discarded part of this much used alley. This meant that the prayer of the Complaint and of the Amended Complaint as to reversion of any part of this alley clearly indicated that no defendant would lose the right to continue all public uses he or it then was using, such as physical access, by either vehicle or pedestrian.

To show affirmatively the physical effect of closing off the 116 feet of said East-West Alley Petitioner addressed interrogatories to two Respondents, the City of Loiusville and Eli Brown and Sons, Inc. The response which the City made to Interrogatory No. 17 was:

> "Abutting owners, upon closing, would own the closed portion free from the public use."

The response which Respondent, Eli Brown and Sons, Inc. made to Interrogatory No. 6 included the following sentence:

> "It is the understanding of the undersigned that in the event an Order is entered closing 116 feet of said alley, that the abutting landowner would become the owner free and clear of the easement for public purposes."

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Both the Complaint and the Amended Complaint are limited solely to the right to close a specific part of the East-West Alley. No pleading filed by Respondent, City of Louisville, even suggests any steps other than a closing. That would necessarily eliminate public service rights in said alley of other abutting owners that have legally existed since 1817. Petitioner has been owner of a lot abutting on the alley since 1923.

The Memorandum Opinion filed by the Chancellor in this action on May 1, 1968 indicates that the Chancellor had not understood the decision of the Kentucky Court of Appeals in Riedling, *et al.* v. Harrod, 298 Ky. 232, 182 S. W. 2d 770. That Opinion in 1944 not only refuses to follow that Court's own ruling in Henderson Elevator Company v. City of Henderson, 187 Ky. 453, 210 S. W. 809, but chooses to follow its decision in Henderson v. City of Lexington, 132 Ky. 390, 111 S. W. 318, rather than in the case of Haller, *et al.* v. City of Louisville, 107 S. W. 741, 32 K.L.R. 1045, which the Riedling Opinion expressly overrules.

That Opinion of the Chancellor included two other points, in which the Chancellor seems to have erred. He says the contention that KRS 93.360 is unconstitutional is without merit, and claims that the case of Henderson v. City of Lexington, cited *supra,* supports the conclusion. The Chancellor overlooks the facts in the Henderson case that the City of Lexington and all three Railroad Companies building the facilities at the Lexington depot had then the right of eminent domain.

The question as to extent of Court consideration as to the necessity for the closing was thoroughly consid-

ered by the Kentucky Court of Appeals by reference to Sections 13 and 242 of the Kentucky Constitution, as well as recognized textbooks.

The Henderson Opinion says in part (pp. 400-401):

> "Under this act the city council is empowered to determine *the necessity for the closing, as well as the question of whether the closing is for a public use;* the only matter left by the terms of the act to the courts being to impanel a jury to ascertain the amount of compensation. The serious objection urged to the validity of this act is that it invests the city council with the sole authority to decide whether the closing is necessary for public purposes, apparently denying to the courts the right to inquire into this question. Section 13 of the Constitution of the state provides in part that: 'Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.' And section 242 declares that: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction'." (Italics supplied.)

The Henderson Opinion expressly recognizes that the closing of an alley is the exercise of the principles of eminent domain, as follows (pp. 401-402):

> "It is admitted that, the closing of a public street, alley, or highway is a taking of private

property within the meaning of these constitutional provisions, and that compensation must be made to the abutting owners, and, further, conceded *that the closing must be necessary for public purposes.* Indeed, these two principles are too well settled to need more than the mere citation of the authorities that support them. Transylvania University v. City of Lexington, 3 B. Mon. 25, 38 Am. Dec. 173; Lexington & Ohio R. Co. v. Appelgate, 8 Dana, 289, 33 Am. Dec. 497; Gargan v. Louisville, New Albany & Chicago R. Co., 89 Ky. 212, 12 S. W. 259, 11 Ky. Law Rep. 490, 6 L.R.A. 340; City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Bannon v. Rohmeiser, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Cooley's Constitutional Limitations, p. 651. So that the question narrows down to the proposition: Is it essential to the validity of an act like the one under consideration that the courts should be given the right and discretion to pass upon the question whether or not the taking is for a public purpose when this issue is made, or can the General Assembly of the state by a legislative act deprive the courts of the power to inquire whether or not the taking is necessary for a public purpose. In the consideration of this question it should not be overlooked that, although public corporations cannot, except for public purposes, take without his consent the property of the individual, yet *there is a difference as we will presently point out between taking private property for the use of a private corporation and taking property by a municipal corporation for the use of the municipality.*

"Whenever it is attempted in the interest of a private corporation to take private property and

> *devote it to a public use, the question as to whether the use to which it is to be put is or not a public one rests with the courts to decide.* This principle is well settled in this state." (Italics supplied.)

The Henderson Opinion says further (p. 404):

> "A case might be presented where the court after hearing the evidence would refuse to permit a municipality to open, widen, or close a street, alley, or way as if it was made to appear that the purpose was to promote private ends and that the action was not in the interests of the public. City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120, 18 Ky. Law Rep. 10. Lewis on Eminent Domain, Section 134; 27 Am. & Eng. Ency. of Law, p. 114."

The other point is the statement by Petitioner that the City had no right to close the alley because the alley came to it under a deed of trust some 150 years ago. We concede that the point would be good if the taking was in the public interest. Furthermore, the Opinion was in error as to there being a presumption because the Responses filed by both the City and Eli Brown and Sons, Inc. directly admitted that the property was being released from any public purpose. This action is a phase of condemnation.

The Chancellor then proceeded to admit considerable evidence as to an investigation by a zoning commission and a business trade neither of which is authorized or intended by Section 93.360. The Chancellor further seems to think that the absence of any provision in the 1966 Statute as to requiring that the closing would not be injurious to any abutting owner, elimi-

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nated any consideration of these parties. This legal point will be discussed further.

After admitting the interrogatories submitted to Respondents, City of Louisville, and, Eli Brown and Sons, Inc., and the responses these Respondents gave to these interrogatories, and after the Chancellor had heard orally all testimony presented by the parties, Respondents, Robinson and Rectenwald, moved for a finding against the proposed closing as only a swap, which is not authorized by this Statute, and Petitioner William E. Barth moved the Court for a judgment against the closing, because the evidence shows the purpose of closing was not for the benefit of the public.

Mr. Barth testified that within the previous eighteen months Mr. Eli Brown had contacted him as to selling his lot to the Brown corporation. Mr. Robinson, whose property adjoins Mr. Barth's property on the east testified that Mr. Brown wanted to purchase the Barth, the Robinson-Rectenwald and the Spradlin property on which the Brown corporation had, and has, an option until 1972. None of the owners' whose land abuts on the East-West Alley has any objection to the City of Louisville procuring land so that its North-South Alley can reach Liberty Street. These parties, as defendants, did, however, resist strenuously a physical restriction upon continued use of the alley privileges these abutting owners had by the access route to and from Fifth Street.

Petitioner's Answer to the requested closing points out in his first defense that neither the Ordinance nor the Complaints specify any benefit to the City of Louis-

ville, from such closing, while the other owners of Liberty Street property and their customers would lose entirely the trade coming to them from or going to Fifth Street. If these customers continue to deal with these abutting owners, they would (with the West end of the alley closed) have to become a part of the increased traffic to Walnut Street, the sole alley exit.

Petitioner denied the allegation that the closing of the alley would be beneficial to Louisville, and alleged that this alley now provides a trunk sewer, paved roadway, delivery service, telephone lines and gas and electric lines.

Petitioner further pleaded, as did Respondents, Robinson and Rectenwald, that the 1966 Act as to alley closing is null and void. Petitioner bases his claim of such violation of constitutional rights to the fact that the property rights of owners abutting an alley are being positively taken from these abutting owners in direct violation of the Fourteenth Amendment to the United States Constitution and of Section 242 of the Kentucky Constitution.

The rights of abutting owners on any alley or street have been fully recognized in Kentucky since earliest pronouncement of the common law principles in Kentucky and have been protected both under Federal and Kentucky cases. It is most interesting to observe the careful and consistent attitude which Kentucky Courts have maintained in protecting the most definite private and public rights of owners of abutting property.

In the Circuit Court the Chancellor overruled the Motions for Judgment of various defendants, with an

observation that the pleadings do not show beyond all doubt the taking of the property for a public purpose or that the property (whose property?) is taken for a private purpose. In that Court both the original parties, the City and the defendant (Eli Brown and Sons, Inc.) had expressly stated in response to interrogatories that the part of the East-West Alley requested to be closed would thereafter be "free from the public use." As the alley had been subject to rights of abutting owners since October, 1817, the Chancellor missed the fact that both Complaints filed by the City of Louisville gave the 1966 Ordinance the interpretation which the Court of Appeals in the Riedling case recognized as applicable to owners of land abutting on University Place, no right to order or enforce a closing or blocking of any part of said alley.

This action was tried orally before the Chancellor on August 15 and 16, 1968.. On August 16, 1968, on Motion of counsel for Mr. Barth and counsel for Messrs. Robinson and Rectenwald, all interrogatories addressed to Eli Brow nand Sons, Inc. and to the City of Louisville and Eli Brown and Sons, Inc. were ordered to be made a part of the evidence in chief in this action. The Chancellor was fully informed of the injuries to rights of abutting owners.

REASONS FOR ALLOWANCE OF WRIT.

Petitioner is located on a two-way alley in a central down-town area. His office is located in a two-story building with a garage behind on the target alley which Respondent City of Louisville seeks to close despite the loss by other abutting owners along that alley of entire use of the rights, conveniences and privileges in the West 46 per cent of that alley.

Petitioner insists that there are three particularly strong reasons why his property rights, as well as those of other abutting owners, should be preserved and protected under laws well recognized in Kentucky. These property rights are as follows:

I. As interpreted by the City of Louisville, Subsections (2) and (3) of Section 93.360 are in violation of the Fourteenth Amendment to the Constitution of the United States of America, and of Sections 13 and 242 of the Kentucky Constitution.

II. The affirmance of Judgment entered October 2, 1968, conflicts with Well Established Law as to Specific Property Rights of Abutting Owners.

III. In Condemnation actions, the property owners, if entitled to recover compensation are entitled to all compensation in cash.

I.

Constitutionality of 1966 Statute—Petitioner has owned his place of business for 47 years. During all this time his office building and his office garage have been located on the alley which has provided much

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valued and convenient services and specific routes for both vehicular and pedestrian use.

The right to retain these privileges and rights has been carefully protected in such well reasoned opinions as Riedling, *et al.* v. Harrod, *et al.*, 298 Ky. 232, 182 S. W. 2d 770 and Powell, *et al.* v. City of Irvine, *et al.*, Ky., 258 S. W. 2d 706 (1953). The decision in this action has dodged the above named opinions and has departed from the accepted and usual course in preserving property rights in alleys.

The Riedling case arose in the City of Louisville about 1941. So the appeal from the injunction awarded to Mr. Harrod and others in 1944 really involved Section 93.360 KRS as it existed before 1966. Yet the Kentucky Court of Appeals in the Riedling opinion chose to consider Section 93.360 and Section 94.360 (the law applicable to third class cities) together, and accepted the text in 94.360 as the legislative will in both classes of cities. Riedling v. Harrod, 298 Ky. 232, 182 S. W. 2d 770, says in part (p. 238):

> "It being the view of this court that not only is the opinion in the Henderson case the sounder of the two, but that it also correctly interprets the legislative will, the opinion in the Haller case is now overruled."

Then in 1966 Section 93.360 was revised and the requirement of no injury to other abutting owners was omitted from Subsection (3) of the new statute. But with the interpretation of Section 94.360 as expressed in the Riedling Opinion, we find the new statute has been already interpreted in the Henderson Opinion.

As a matter of fact the new Subsection (3) of the present Section 93.360 authorizes a decree for closing only "if a defendant fails to object." In this case owners of the two lots next east of the corner lot owned by Eli Brown and Sons, Inc. have persistently asserted their rights to continuation of the entire East-West Alley. As a matter of fact the basic case on rights of abutting owners (on alleys and streets), the Henderson case, holds that (p. 401):

> "It is admitted that, the closing of a public street, alley, or highway is a taking of private property within the meaning of these constitutional provisions, and that compensation must be made to abutting owners, *and* further, conceded that *the closing must be necessary for public purposes.*" (Italics supplied.)

This might make the error of the Jefferson Circuit Court in holding the 1966 closing statute constitutional appealable as a matter of right, but there are other grounds asserted by Petitioner on which a Petition for Certiorari is the prescribed method for seeking appropriate aid from this Court.

II.

The Judgment of the Jefferson Circuit Court Conflicts with the Law in Kentucky—The Motions to Dismiss this action made by the owners of two abutting lots, at the close of the evidence in this action, were based on evidence presented as well as on the City of Louisville's failure to show facts that would justify a

closing. Both the Respondent City of Louisville and Respondent Eli Brown and Sons, Inc. made answers to interrogatories to the effect that the closing of the west end of the alley would cause the closed section to be freed of the easement for public use.

With that situation, the City might be entitled to the closing of some portion of an alley if all defendants failed to object to an alley closing. Instead this case falls within the Kentucky Court of Appeals in City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120. This action was filed by the City of Louisville to close a 40 foot alley extending from 13th Street to 14th Street and connected with Cotton Street. The Petition states that "the closing of the alley is a public necessity and will be a public benefit, would benefit the City of Louisville and injure none of the owners of property on the square."

The Petition alleged that the general council passed an ordinance directing the City Attorney to institute an action to close the strip as a public way. Some defendants filed answers admitting, that the closing would be a benefit to the City, but other defendants filed answers denying the averments of the Petition. The ordinance recited that Patrick Bannon had promised to pay the City of Louisville $2,000 for the strip of land, and the said way should be discontinued as a public way.

The Opinion in that case was written by Judge George Durelle, a distinguished member of the Louisville Bar, and then a member of the Court of Appeals in 1896. The Opinion says in part (pp. 78-79):

> "No evidence is produced of any need that the city has for the land embraced by the alley, or of any public use to which it could be put. The intent of the ordinance and the proceeding based upon it was to allow the land to revert to Bannon as the owner of the abutting property in consideration of two thousand dollars. A mere money consideration, to be paid to the government, State or municipal, is not a public use for which private property can be taken from one citizen and given to another. Nor is it pretended that this is a condemnation proceeding, or that the land embraced in this alley is needed for any municipal use."

The only case where the Kentucky Court of Appeals has upheld the trading of land in changing the route of an alley is Henderson Elevator Company v. City of Henderson, 187 Ky. 453, 219 S. W. 809, 18 A.L.R. 983, which Opinion was considered most thoroughly in the case of Riedling, *et al.* v. Harrod, *et al.*, 298 Ky. 232, 182 S. W. 2d 770, and the Court of Appeals refused to follow it. To do so would amount to trading abutting owner's rights against one another, as opposed to the rights obtained as a voluntary purchaser.

The principles announced in the case of Henderson v. City of Lexington, 132 Ky. 390, 111 S. W. 318, were specifically applied in the case of Avey Drilling Company v. Lukowsky, Ky., 261 S. W. 2d 432, so as to enjoin the passage of an ordinance that would prefer the convenience of a private corporation over public benefit, as applied to closing an alley. In this case, the City of Louisville seeks to close an alley, when the closing would prevent further use of the alley in the public

service it has provided for over 50 years. We earnestly insist that the judgment entered in October, 1968 be now reversed and the public service be ordered to be continued for the abutting owners.

III.

Compensation in Cash—In Volume 3 of the Third Edition of Nichols on Eminent Domain the author discusses the general subject of the Right to Compensation. In Chapter VIII, Section 8.1, paragraph (2) starts as follows (p. 6):

> "It is now well settled law in every portion of the United States that when private property is taken by eminent domain the owner of the property is constitutionally entitled to compensation."

Section 8.2 starts as follows (pp. 17-18):

> "While the constitutions do not ordinarily prescribe the medium by which compensation shall be paid, that the compensation must be in money is a qualification that has been read into the phrase now under consideration by all the courts in which the question has arisen."

Section 8.3 starts as follows (p. 23):

> "The right of an owner of property taken for the public use to compensation is an absolute one, and it cannot be made subject to conditions. . . ."

The Final Judgment entered in this action in paragraph 1 made a finding that the closing of the alley

"is for a public purpose;" when the litigants promoting the closing had admitted in sworn responses that upon the actual closing the closed portions would revert to a private owner, free of the public service to which Petitioner and other owners had property rights.

This Final Judgment provided in paragraph 2 for defendants recovering a diminution of market value their properties might suffer, when the losses which said abutting owners would suffer are in other property rights instead of market value.

The third paragraph of said Final Judgment in addition to the alleged diminution of market value with an express proviso reading as follows: "provided Eli Brown and Sons, Inc. shall bear the cost of relocating all public utilities which service the objecting defendants" in lieu of complete recovery of damages in cash.

The status of this action now as far as the objecting property owners are involved (against their wills) is that the City of Louisville still has the alternative of paying damages that may be allowed against it or refusing to do so and even to refuse to pay such damages if another corporate defendant, Eli Brown and Sons, Inc., decides not to remove and substitute all the various public utility facilities.

Petitioner insists that in a condemnation proceeding, which conditionally provides for discontinuance at the will of the Respondent City of Louisville and/or Respondent Eli Brown and Sons, Inc. Petitioner has the right to a certain judgment against the City of Louisville for all its property rights which are involved in this type of eminent domain.

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Both the United States Supreme Court and the Kentucky Court of Appeals specifically recognize and uphold the right to judgment certain in eminent domain proceedings.

Phelps v. United States, 274 U. S. 841, 47 S. Ct. 611, 71 L. Ed. 1083.

Natcher v. City of Bowling Green, 264 Ky. 584, 95 S. W. 2d 127.

Frenel v. Commonwealth, Ky., 331 S. W. 2d 710.

These decisions should not only justify, but require a preservation of existing rights to use of such property privileges in abutting alleys or streets. A more controlling principle is contained in Kentucky in Section 65.010 Kentucky Revised Statutes, relating to municipalities or counties concerning real estate, since the final sentence of that section reads as follows:

> "This section shall not apply to any public street, sidewalk, right-of-way or other easement."

This statutory section expressly forbids any City in Kentucky from selling or transferring any public easement regardless of the failure of the City of Louisville to recognize this restriction.

CONCLUSION.

Petitioner respectfully asks this court to give recognition to his rights and to the rights of neighboring owners of abutting property as were fully recognized by Kentucky's eminent Chief Justice, Honorable George Robertson, who recognized these property

rights in 1839, and Honorable John D. Carroll, who recognized in 1908 in the Henderson Opinion both the same property rights in private and the necessity for existence of a future public purpose of these uses.

Respectfully submitted,

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Attorneys for Petitioner.

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MAY 7 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1538

WILLIAM E. BARTH, - - - - Petitioner,

versus

CITY OF LOUISVILLE, a Municipal Corporation;
ELI BROWN & SONS, INC.; and
D. H. ROBINSON and E. F. RECTENWALD, Respondents.

APPENDICES TO ACCOMPANY PETITION FOR WRIT OF CERTIORARI.

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Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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CERTIFICATION.

The undersigned certifies that copies of the Appendices for the Petition for Writ of Certiorari filed by the Petitioner, William E. Barth, have been sent or delivered to Counsel for all parties and to the Judges of the Court of Appeals of Kentucky and of the Jefferson Circuit Court, this ____ day of May, 1970.

BLAKEY HELM

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APPENDIX A—ITEM I.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FOURTH DIVISION

CITY OF LOUISVILLE, - - - - - - *Plaintiff,*

v.

ELI BROWN AND SONS, INC., ET AL., - - *Defendants.*

MEMORANDUM OPINION—Filed May 1, 1968.

The City of Louisville, hereinafter referred to as "Louisville," filed a complaint requesting the closing of an alley, which is the first alley south of Liberty Street on the east side of Fifth Street for a distance of 116 feet, said alley running eastwardly towards Fourth Street.

Eli Brown & Sons, Inc. was made the defendant and entered its appearance, consent, and waiver to the closing.

Subsequently the complaint was amended and many defendants were brought into the action. The great majority of them agreed to a judgment without compensation closing the alley, but defendants, William E. Barth, D. H. Robinson, and Edward F. Rectenwald, objected to the closing of the alley and in addition Barth prayed that the Court require Louisville to return the alley to its original width of 23 feet. Barth also prayed that the Court require Louisville to remove posts now located in the alley.

Motions for judgment on the pleadings have been filed by defendants, D. H. Robinson and Rectenwald, and defendant, W. E. Barth, and plaintiff, City of Louisville. All such motions must be overruled and the Court will not

belabor counsel with an extensive opinion. Very briefly, the proposition advanced by defendants, Robinson and Rectenwald, to the effect that K.R.S. 93.360 is unconstitutional is without merit. The same contention was made in the case of *Henderson* v. *City of Lexington*, 132 Ky. 390, 111 S. W. 318 and decided adversely to the landowners. Under K.R.S. 93.360 the landowners have the right in the judicial proceeding pending before this Court to question whether or not the taking or closing of the alley is for a public purpose. This is true even though the statute does not expressly say so. See Henederson v. City of Lexington, supra, at Page 322 of 111 S. W. As for the contention that the act is vague because it does not specify to whom the property located in the alley will belong after the alley is closed, the answer is that the statute does not attempt to so specify and that the question has been answered by our Courts many times, particularly in the case of *Henderson Elevator Company* v. *City of Henderson*, 187 Ky. 453, 210 S. W. 809. See particularly the discussion on pages 460 and 461 of Volume 187 Kentucky Reports.

The contention of William E. Barth that the City has no right to close the alley because of a deed of trust executed some 150 years ago is without substantial merit. The cases of Henderson v. City of Lexington, supra, and Henderson Elevator Company v. City of Henderson, supra, both realize and recognize that a city has a right in the public interest to close a street, a part of a street, or an alley or part of an alley, even though the deed conveying the property to the City requires the property to be maintained for street or alley purposes. The reasons for the rule are set out in detail in the Henderson v. City of Lexington case and are not necessary to repeat here.

The Henderson v. City of Lexington case, supra, states the proposition that where a municipality acting under a proper statute or ordinance enacted pursuant to a legis-

lative grant of power determines that the private property must be taken for a public purpose or that a street or alley must be closed for public purpose, there is a presumption that the property in question is being taken for a public purpose. That presumption may be rebutted by the property owner but the burden of proof is upon the property owner to show that the property was not taken for a public purpose. In the Henderson v. City of Lexington case the Court of Appeals held that the Circuit Court did not have to take any evidence upon the question of whether or not the taking was for a public purpose since it was obvious to the Court of Appeals that the particular purpose in that case was a public one as gathered from the pleadings. In the case at Bar it is the Court's opinion that the pleadings do not show beyond all doubt the taking of the property for a public purpose or do they show beyond all doubt that the property is taken for a private purpose. Therefore, this action must be tried and evidence produced with the burden on the land owners to show the taking to be not for a public use.

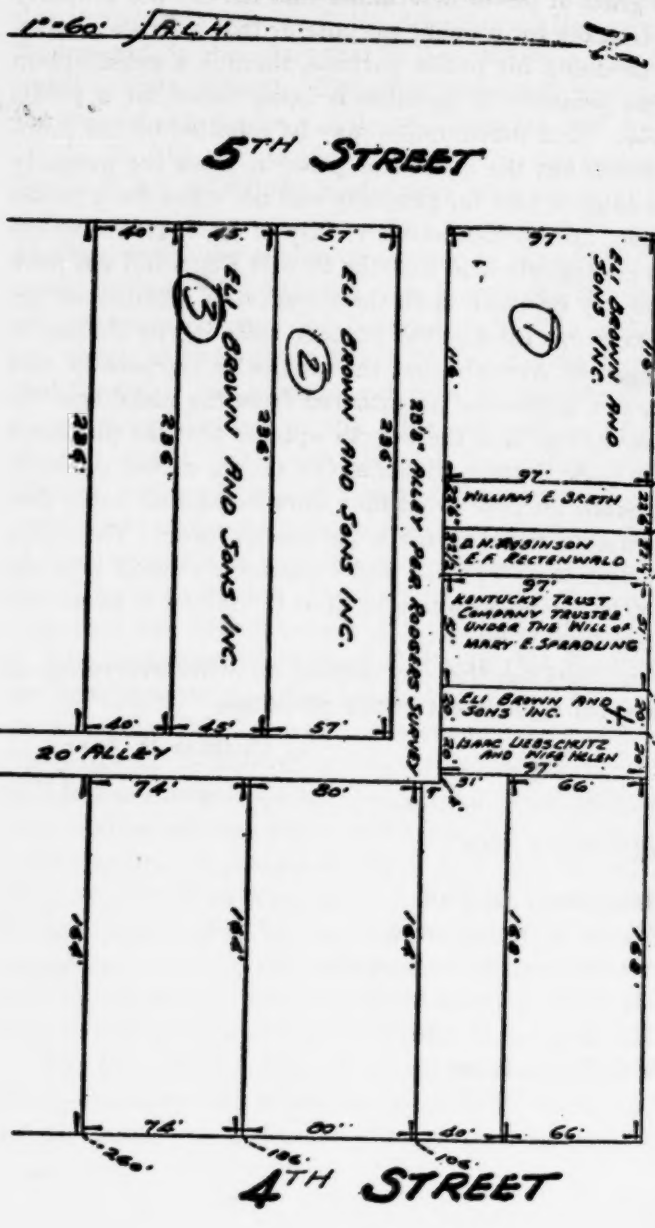
The Court has this day entered an order overruling all motions for a judgment on the pleadings.

/s/ CHARLES M. ALLEN,
Judge

Dated: May 1, 1968

cc: Mr. John T. McCall
Mr. D. H. Robinson and
Mr. Edward F. Rectenwald
Mr. Felix J. Sanders, Jr.
Mr. Marshall P. Eldred, Jr.
Mr. Blakey Helm

APPENDIX A—ITEM 2.


1"=60' J.R.L.H.
5TH STREET
ELI BROWN AND SONS INC.
WILLIAM E. SMITH
B.N. ROBINSON & E.A. RECTENWALD
KENTUCKY TRUST COMPANY TRUSTEE UNDER THE WILL OF MARY E. SPRADLING
ELI BROWN AND SONS INC.
ISAAC LIEBSCHUTZ AND WIFE HELEN
ELI BROWN AND SONS INC.
ELI BROWN AND SONS INC.
ELI BROWN AND SONS INC.
25½' ALLEY PER ROGERS SURVEY
20' ALLEY
LIBERTY STREET
4TH STREET

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APPENDIX B.

Appendix B, Item 1—Interrogatory No. 17—To City of Louisville:

If an Order is entered closing the first alley South of Liberty Street running Eastward from 5th Street, will the land revert or otherwise pass to individual owners?

Appendix B, Item 2—Response to Interrogatory No. 17—City of Louisville:

Abutting owners, upon closing, would own the closed portion free from the public use.

Appendix B, Item 3—Interrogatory No. 6—To Eli Brown and Sons, Inc.:

If an order is entered closing the first alley South of Liberty Street running Eastward, who would become the owner of the vacated land?

Appendix B, Item 4—Response to Interrogatory No. 6—Eli Brown and Sons, Inc.:

It is the understanding of the undersigned that in the event an Order is entered closing 116 feet of said alley, that the abutting landowner (Eli Brown and Sons, Inc.) would become the owner free and clear of the easement for public purposes. The ownership of the remainder of the alley would remain as it is now.

APPENDIX C, ITEM 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed September 17, 1968.

The City of Louisville passed its ordinance No. 183, Series 1966 by which it authorized the institution of an action in this Court for the purpose of closing as a public way the first alley south of Liberty Street on the east side of Fifth Street for a distince of 116 feet running eastwardly. Passage of this ordinance was followed by the filing of this law suit. All necessary parties have come into the action and many have consented to the closing of the alley but others have vigorously objected and as a result the Court has taken proof for two days and obtained briefs from the parties in order to reach a just result.

An application was filed with the Planning and Zoning Commission on February 5, 1964 for the closing of this particular portion of the alley. At that time the Board of Aldermen referred all street and alley closings to the Planning and Zoning Commission for its approval before taking any legislative action with respect thereto. The Planning and Zoning Commission would then confer with each of the companies having utilities located in the street or alley to be closed to determine whether or not suitable arrangements could be made for the relocation of the utilities in the street or alley. The Commission would then forward its recommendation to the Board of Aldermen.

The application referred to above was made by defendant, Eli Brown & Sons, Inc. The application provided in part that Eli Brown & Sons,, Inc., hereinafter referred to as "Eli Brown," would exercise its option to convey to the City of Louisville, hereinafter referred to as the "City," a 20 foot lot running on Liberty Street so that the north-

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south alley running north from Walnut Street might be extended to Liberty Street. This was Lot 39 on the County Assessor's plat. Additionally Eli Brown agreed to convey to the City an area not to exceed 200 square feet of its tract located west of the north-south alley to provide an easy turn into the new alley extension. This was Lot 31 on the County Assessor's plat.

The application also stated in part that this closing would enable Eli Brown to develop its tract at the southeast corner of Fifth and Liberty so that a major office building might be built there.

The Planning and Zoning Commission recommended the closing on March 20, 1964 following investigation of the matter and discussion with the various utility companies, the Director of Works, the Director of Law, the Director of Traffic Engineering, and various engineers.

As presently constituted, the portion of the alley which is sought to be closed is abutted on both sides by property owned by Eli Brown. As it runs east towards a right angle turn, it is abutted on the north side by properties belonging to William Barth & Sons, D. H. Robinson and Edward F. Rectenwald, Liebschutz & Company, and a lot owned by a painting and sign company. On its south side it continues to be bounded by property owned by Eli Brown which is described as Lot No. 31 on the County Assessor's plat. At the point where the alley takes a right angle turn towards Walnut Street and to the south there is located a large telephone pole. The testimony conclusively shows that the alley on its north-south axis abuts on the rear of many department stores and other businesses. This portion of the alley is used by many large trucks and trailer trucks, and as a result, is often congested when such vehicles load and unload at the department stores on this portion of the alley. One of the major causes of congestion is the right angle turn which must be made where the telephone pole now stand since Kresge's store is on the west side of the

north-south alley at a point almost across the alley from the telephone pole. The right angle turn is impossible to make when trucks are unloading at Kresge's.

In order to improve this situation and create an alley running directly north and south from Walnut Street to Liberty Street Mr. Eli Brown on behalf of his company offered to purchase the property owned by the Leibschultz Book Store and dedicate it to the use of the City for an alleyway. When Mrs. Leibschultz refused to sell to him, he thereupon purchased the property formerly owned by Bruce Hoblitzell & Company which he has offered to dedicate to the use of the City for the north-south alley. If the closing of the portion of the east-west alley is approved, Eli Brown's conveyance to the City of the Hoblitzell tract plus the conveyance of the 200 square feet of Tract 31 should greatly improve traffic conditions on the north-south alley.

The defendants who object to the closing of the portion of the alley which lies east of their properties will still be able to use all of the east-west alley with the exception of the closed portion and will be able to use the approved north-south alley. The businesses of William Barth & Son and of the Legal Aid Society which occupies the building owned by Robinson and Rectenwald are respectively a real estate business and legal business. It seems apparent that their need for heavy delivery trucks to service their premises will be infrequent and much more infrequent than the needs of the storekeepers along the north-south alley who receive heavy deliveries of goods on a frequent basis.

William E. Barth & Sons and Robinson and Rectenwald complain about an alleged lack of public services or utilities that will be available to them. The answer to this is that the City has stated that it will not allow the closing of the alley unless such services are made available to the abutting property owners at no cost to them or to the City. Eli Brown must bear the cost of whatever relocation of facil-

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ities that are necessary in order to facilitate the closing of the east-west alley.

The objecting defendants have raised many points in objection to the closing of the alley. The Court has already disposed of many of these objections and will not discuss them again except to say that in its opinion K.R.S. 93.360 is constitutional and authorized the closing of an alley or street when such closing is for a public use and when compensation for its taking is paid to the abutting property owners. See *Henderson* v. *City of Lexington*, 132 Ky. 390, 111 S. W. 318 at Pages 321 and 322.

The objection that the City of Louisville has no right to close the alley because it was deeded to the City by a deed of trust in 1817 is without merit. See Henderson v. City of Louisville, supra, at Page 324 of 111 S. W.

The argument that the closing of the alley may result in a private benefit to Eli Brown is without merit where the closing of the alley is in the public interest. See Henderson v. City of Louisville at Page 323 of 111 S. W.

The argument of the defendants that the City has no authority to close the alley because the closing of the alley is for the benefit only of Eli Brown and constitutes a trade of property between the City and Eli Brown is not persuasive. It is to the benefit of the City and of the users of the north-south alley as well as of the general public that the north-south alley be extended through from Walnut Street to Liberty Street in as straight a manner as is feasible and with as little expense to the City as is possible. In the instant case the City has secured the right to improve the north-south alley without expending any of its own funds for that purpose. True, it is closing a portion of the east-west alley and that portion will revert to the abutting property owner which is in this case Eli Brown. The Court believes that this set of facts takes the case out of the doctrine of *Bannon* v. *Rohmeiser*, 90 Ky. 48, 13 S. W. 444.

In that case the City simply closed the alley upon the payment of $2,000 by the property owner. No benefit to the City was shown or to the public who used the alley other than the payment of the $2,000. This was held to be an improper use of municipal powers and rightly so.

In the instant case the objecting defendants will have the right to demand just compensation from the City of Louisville for any diminution in value of their property caused by the closing of the portion of the east-west alley which is to be closed. See Henderson v. City of Lexington, Supra. They will still have access to their properties on Liberty Street and n the east-west alley, although they must approach their properties from the east rather than from Liberty Street.

A judgment should be tendered by the City of Louisville authorizing it to close the portion of the alley which it seeks to close; providing, however, that Eli Brown shall bear the cost of relocating all public utilities which service the objecting defendants, and provided further that the objecting defendants shall have the right to have determined before a jury in the Common Pleas Branch of this Court the amount of compensation to be awarded to them for whatever diminution in market value their properties may suffer from the closing of the alley.

There has been proof introduced that the alley which is sought to be closed is 23 feet and 3 inches in width rather than the 20 feet per the deed of trust so that there can be no question about the right of the City to close the entire width of the alley for 116 feet.

The objecting defendants contend that there are some posts which are within the right-of-way of the alley and which should be removed by the City. No great issue has been made of this matter and the Court prefers to reserve judgment on it at this time within the understanding that the parties may present written memoranda setting out their views as to what should be done in this connection.

Counsel for the City of Louisville may tender a judgment in accordance with these findings of fact and conclusions of law at the Motion Hour of the Court on Thursday, September 26, 1968, at 11:00 A.M.

/s/ CHARLES M. ALLEN,
Judge

Date: September 16, 1968

cc: Mr. John T. McCall
Mr. D. H. Robinson and
Mr. Edward F. Rectenwald
Mr. Felix J. Sanders, Jr.
Mr. Marshall P. Eldred, Jr.
Mr. Blakey Helm

APPENDIX C, ITEM 2.

MOTION TO STRIKE SPECIFIC PARTS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 26, 1968.

Defendant, William E. Barth, moves the Court to strike from the Findings of Fact and Conclusions of Law entered by this Court on September 16, 1968, specific parts of said document as hereinafter listed, for the reasons set out in connection with each of said parts, to-wit:

1. The following words and figures in the first paragraph on page 1 of said document beginning in line 7 of said paragraph, reading as follows:

"and many have consented to the closing of the alley" because practically all of the defendants who have consented to the closing of a part of the east-west alley did not and do not own property abutting on the east-west alley (the only alley of which any part is sought to be closed), and said defendants not owning property abutting on the east-west alley were neither necessary nor proper defendants in this action.

2. The second paragraph on page 1 of said document, reading as follows:

> "An application was filed with the Planning and Zoning Commission on February 5, 1964 for the closing of this particular portion of the alley. At that time the Board of Aldermen referred all street and alley closings to the Planning and Zoning Commission for its approval before taking any legislative action with respect thereto. The Planning and Zoning Commission would then confer with each of the companies having utilities located in the street or alley to be closed to determine whether or not suitable arrangements could

be made for the relocation of the utilities in the street or alley. The Commission would then forward its recommendation to the Board of Aldermen."

because the statutory provisions as to closing of alleys do not confer any duties or authority upon the Louisville and Jefferson County Planning and Zoning Commission, and any action or steps taken by said Commission was unauthorized and without authority, and of no legal consequence in this action.

3. The first and second paragraphs on page 2 of said document, reading as follows:

"The application referred to above was made by defendant, Eli Brown & Sons, Inc. The application provided in part that Eli Brown & Sons, Inc., hereinafter referred to as 'Eli Brown,' would exercise its option to convey to the City of Louisville, hereinafter referred to as the 'City,' a 20 foot lot running on Liberty Street so that the north-south alley running north from Walnut Street might be extended to Liberty Street. This was Lot 39 on the County Assessor's plat. Additionally Eli Brown agreed to convey to the City an area not to exceed 200 square feet of its tract located west of the north-south alley to provide an easy turn into the new alley extension. This was Lot 31 on the County Assessor's plat.

"The application also (stated) in part that this closing would enable Eli Brown to develop its tract at the south-east corner of Fifth and Liberty so that a major office building might be built there."

because both said paragraphs relate solely to an attempt to trade off rights in an existing public alley, then and now used for public purposes to procure other and different land which plaintiff desires to use for the benefit of property-

owners whose property abuts on a different alley or proposed alley from the one sought to be closed in this action, and because the statute applicable to cities of the first class provide entirely separate methods for procuring such desired land or rights in land.

4. The third paragraph on page 2 of said document, reading as follows:

> "The Planning and Zoning Commission recommended the closing on March 20, 1964 following investigation of the matter and discussion with the various utilities companies, the Director of Works, the Director of Law, the Director of Traffic Engineering, and various engineers."

for the same reasons stated above as to item 2 of this motion.

5. The sentence starting in line 2 on page 2 of said document through the rest of that paragraph and the next following paragraphs, reading as follows:

> "The testimony conclusively shows that the alley on its north-south axis abuts on the rear of many department stores and other businesses. This portion of the alley is used by many large trucks and trailer trucks, and as a result, is often congested when such vehicles load and unload at the department stores on this portion of the alley. One of the major causes of congestion is the right angle turn which must be made where the telephone pole now stands since Kresge's store is on the east side of the north-south alley at a point almost cross the alley from the telephone pole. The right angle turn is impossible to make when trucks are unloading at Kresge's.
>
> "In order to improve this situation and create an alley running directly north and south from Walnut Street to Liberty Street Mr. Eli Brown on behalf of

his company offered to purchase the property owned by the Liebschutz Book Store and dedicate it to the use of the City for an alleyway. When Mrs. Leibschutz refused to sell to him, he thereupon purchased the property formerly owned by Bruce Hoblitzell & Company which he has offered to dedicate to the use of the City for the north-south alley. If the closing of the portion of the east-west alley is approved, Eli Brown's conveyance to the City of the Hoblitzell tract plus the conveyance of the 200 square feet of Tract 31 should greatly improve traffic conditions on the north-south alley."

because the finding therein relates entirely to the situation in a north-south alley not mentioned or involved in the alley closing requested in this action.

6. The sentence beginning in line 1 of page 4 through the rest of that paragraph of said document, reading as follows:

> "It seems apparent that their need for heavy delivery trucks to service their premises will be infrequent and much more infrequent than the needs of the storekeepers along the north-south alley who receive heavy deliveries of goods on a frequent basis."

because no public purpose would be served by any limitation on the use of the east-west alley to the present uses thereof, and because any order depriving the present property owners abutting on said east-west alley of the property rights vested in them by the dedication of said alley to the Town of Louisville in October, 1817, forbidding any obstruction of said alley, would wrongfully take rights of abutting owners and because such limitation on the rights of abutting property in the use of said alley would violate Section 13 and 242 of the Constitution of Kentucky and

the Fourteenth Amendment to the Constitution of the United States.

7. The second sentence in the second paragraph starting on page 4 of said document, reading as follows:

> "The Court has already disposed of many of these objections and will not discuss them again except to say that in its opinion K.R.S. 93.360 is constitutional and authorized the closing of an alley or street when such closing is for a public use and when compensation for its taking is paid to the abutting property owners."

because the present statute enacted in 1966 does not require that the closing of the alley be for a public purpose, and in this action the plaintiff does not claim the closing will be for a public purpose and the designated taker of title to the part of the alley sought to be closed has not disclosed any intended public purpose for the land that is ordered to revert.

8. The entire third paragraph starting on page 4 of said document, reading as follows:

> "The objection that the City of Louisville has no right to close the alley because it was deeded to the City by a deed of trust in 1817 is without merit. See Henderson v. City of Louisville, supra, at Page 324 of 111 S. W."

because the conclusion contained therein is apparently based on the opinion in Henderson v. City of Lexington, et al., 132 Ky. 390, 111 S. W. 318, in which the land was taken for a different public purpose for the benefit of three railroad companies, all of which had the power of eminent domain, while the part of the alley sought to be closed, if closed, will not be devoted to a public purpose.

9. The last sentence starting on page 4 of said document through 3 sentences on pages 4 and 5, reading as follows:

"It is to the benefit of the City and of the users of the north-south alley as well as of the general public that the north-south alley be extended through from Walnut Street to Liberty Street in as straight a manner as is feasible and with as little expense to the City as is possible. In the instant case the City has secured the right to improve the north-south alley without expending any of its own funds for that purpose. True, it is closing a portion of the east-west alley and that portion will revert to the abutting property owner which is in this case Eli Brown."

because this is simply attempting to trade existing property rights in property abutting on the east-west alley involved in this action for land not owned by plaintiff, when the statutes as to first class cities do not authorize the purchase of land or the trading of property rights against the wishes of the owners of such property rights.

Counsel for this defendant request the right to submit briefs on this motion.

/s/ Blakey Helm,
/s/ Thomas James, II,
Attorneys for Defendant,
Wialliam E. Barth.

It is hereby certified that copies have been delivered to all counsel in Court on September 26, 1968.

/s/ Blakey Helm,
Attorney for Defendant,
Wialliam E. Barth.

Entered in Court: 10/3/68.
Overruled.
/s/ Charles M. Allen,
Judge.

APPENDIX D, ITEM 1.

FINAL JUDGMENT—Entered October 2, 1968.

This action having come on for trial on August 15 and 16, 1968, and evidence having been introduced on the issues herein, and briefs having been filed by the respective parties, and the Court having made certain Findings of Fact and Conclusions of Law filed herein on September 16, 1968;

IT IS ORDERED AND ADJUDGED as follows:

1. That the closing of the first alley South of Liberty Street on the East side of Fifth Street for a distance of 116 feet running Eastwardly, in Louisville, Jefferson County, Kentucky, is for a public purpose;

2. That the defendants, William E. Barth, Jr. and D. H. Robinson and Edward F. Rectenwald, shall have the right to have determined before a jury in the Jefferson Circuit Court, Common Pleas Branch, the amount of compensation, if any, in the form of damages to be paid to each for any diminution in market value his property may suffer as a result of said closing;

3. That upon payment to William E. Barth, Jr., and D. H. Robinson and Edward F. Rectenwald of the damages awarded to each, if any, or, if any of said defendants refuses or is unable to accept payment, upon payment into Court of the amount awarded that defendant, said portion of subject alley as described in the amended complaint filed herein shall be closed and the area embraced in said portion of subject alley shall revert to the adjoining landowner, Eli Brown and Sons, Inc., provided Eli Brown and Sons, Inc. shall bear the cost of relocating all public utilities which service the objecting defendants.

4. Pursuant to Civil Rule 54.02, this is a final and appealable Judgment and there is no just reason for delay.

5. Notice of the entry of this Judgment shall be served by the Circuit Court upon every party who is not in default for failure to appear and/or who has not waived service of notice of entry in writing.

/s/ CHARLES M. ALLEN,
Judge.

Date: October 2, 1968.
Tendered by: Robert C. Moore.

NOTICE TO CLERK.

Pursuant to Rule 604 of the Jefferson Circuit Court, the undersigned certifies that notice of this Judgment is required to be served pursuant to CR 77.04, upon the following:

Felix J. Sanders, Jr.
Attorney for Defendant, Equitable
Federal Savings & Loan Association
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Louisville, Kentucky 40202

Blakey Helm
Attorney for Defendant,
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1504 Kentucky Home Life Bldg.
Louisville, Kentucky 40202

Marshall P. Eldred, Jr.
Attorney for Defendant, Eli Brown
and Sons, Inc.
231 South Fifth Street
Louisville, Kentucky 40202

/s/ ROBERT C. MOORE.

APPENDIX D, ITEM 2.

AMENDED JUDGMENT—Entered October 24, 1968.

The Judgment entered on October 2, 1968, is hereby amended by adding a paragraph 6 to the directory part thereof, reading as follows:

6. The amount of the claim of defendant, William E. Barth, for losses and damages by reason of the closing of said East-West alley, exceeds Twenty-Five Hundred ($2,500) Dollars.

ENTERED this 24 day of October, 1968.

/s/ CHARLES M. ALLEN,
Judge.

APPENDIX D, ITEM 3.

COURT OF APPEALS OF KENTUCKY

RENDERED: NOVEMBER 21, 1969

WILLIAM E. BARTH, - - - - - - *Appellant,*

v.

CITY OF LOUISVILLE, a Municipal Corporation, Et Al., - - - - - - - - - *Appellees.*

Appeal from Jefferson Circuit Court, Chancery Branch, Fourth Division, Honorable Charles M. Allen, Judge.

OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING.

William E. Barth, owner of property abutting on an alley in the City of Louisville, appeals from a judgment which directed that a portion of the alley be closed. The primary contentions of the appellant are that the closing does not serve a public purpose and that the closed portion will be devoted to a private use, contrary to the terms of the deed of dedication by which the alley originally was established.

The proceeding to close the alley was brought by the city under KRS 93.360. That statute provides for the payment of damages suffered by abutting owners; however, in the instant case the trial court reserved the question of damages for later determination and, by appropriate recita-

tions under CR 54.02, made final and appealable the judgment that the closing be effected.

All of the owners of land abutting on the alley were joined as defendants. However, only Barth and the owner of one other parcel actively defended the proceeding, and only Barth has appealed.

The alley in question lies in a block in downtown Louisville bounded on the north by Liberty Street, on the east by Fourth Street, on the south by Walnut Street, and on the west by Fifth Street. The alley begins on Fifth Street, 97 feet south of Liberty, and runs straight east 236 feet; there it forms an inverted "L" intersection with what the appellant chooses to designate another alley which runs from the point of intersection straight south to Walnut Street. Abutting the alley on the south side, for its entire east-west length, is a parcel of land owned by Eli Brown & Sons, Inc. On the north side of the alley there are six tracts, the first one on the west being 116 feet in width along the alley; the next two 22½ feet each; the next one 51 feet; and the next two 20 feet each. These six tracts all extend from the alley through to Liberty Street. The 116-foot tract on the north side of the alley at the west end is owned by Eli Brown & Sons, Inc. (which also owns all the land on the south side of the alley). The next lot to the east is owned by Barth; the next one by Robinson and Rectenwald; the next one by the Kentucky Trust Company as a testamentary trustee; the next one by Eli Brown & Sons, Inc., and the last one by Helen Liebschutz.

The portion of the alley adjudged in this proceeding to be closed is the west 116 feet. The judgment directs that this portion revert to the abutting owners, which in this instance is the one owner, Eli Brown & Sons, Inc. The result will be that the Brown company will have a single, unified tract rather than two tracts separated by an alley.

The 20-foot tract abutting the alley on the north side at its east end, owned by Helen Liebschutz, would, if ac-

quired by the city, enable the north-south alley to be extended straight north, from its intersection with the east-west alley to Liberty Street, thus providing a straight, 20-foot, north-south alley from Walnut Street to Liberty Street. The possibility of this being accomplished was explored by the city, but Mrs. Liebschutz did not desire to sell. An alternative possibility was to acquire the Eli Brown & Sons 20-foot lot adjoining the Liebschutz lot on the west, which would provide a through north-south alley with only a small offset or jog. The Brown company was approached with a suggestion that the company donate this lot to the city for the north-south alley, in exchange for which the west 116 feet of the east-west alley would be closed and would revert to the Brown company. This proposition was acceptable to the Brown company, and the company had agreed to convey the 20-foot lot to the city upon the effectuating of the closing procedure. The company also has agreed to convey a small triangular portion at the northeast corner of the land it owns south of the east-west alley, so that the offset or jog at the point of extension of the north-south alley will not be abrupt.

The net result of the proposed transaction will be that there will be a north-south alley running through the block in question, with a dead-end spur running west from it to serve the three lots lying between the north-south alley and the Brown company parcel (the last lot on the spur being Barth's).

The record shows that the proposal for the alley changes originated with a group of citizens who were interested in the development of the downtown business section of Louisville, and that the proposal was prompted by the fact that there was a serious problem of traffic congestion in the existing alley. On occasions traffic was backed up on Fifth Street because of the congestion in the alley. It appears that the congestion was due in main part to vehicles servicing business establishments that abut on the north-

south portion of the alley. The congestion was such as could block emergency vehicles in case of fire or other casualty.

The appellant's argument that no public purpose will be served by closing the west end of the east-west alley seems to be based on the propositions (1) that the Brown Company has appropriated six feet of width of the east-west alley, on the south side, and if that width were restored to use the congestion would be substantially eliminated; and (2) that the north-south alley should be restricted to north-south use alone, which would eliminate any congestion in the east-west alley.

We are not persuaded of the validity of those propositions. In the first place, they involve determinations of *fact* on which the evidence was conflicting. In the second place, even if it were found that the congestion could be eliminated by the methods suggested by the appellant, the conclusion would not follow that the method chosen by the city does not accomplish a public purpose. We are not advised of any rule that an alley can be closed only if there is no other possible way of achieving the purpose sought to be accomplished by the closing.

The appellant argues that the real purpose of the closing is to benefit Eli Brown & Sons. The record does indicate that the Brown company will benefit materially; however, it shows also that the public will benefit from relief of traffic congestion, better fire protection, etc. In a case very similar to the instant one this court held that it is no bar to the closing of a street or alley that a private person will receive special benefit, so long as a public purpose is served by the closing. See Henderson v. City of Lexington, 132 Ky. 390, 111 S. W. 318. We believe that holding is sound.

The appellant argues that the closing is in violation of the provisions of the 1817 deed by which the alley originally was dedicated to the city. It is sufficient for us to say that an identical contention was rejected by the court in the

Henderson case, above cited, for reasons which are fully applicable to the facts of this case and which we find to be valid.

The appellant complains of the fact that the Planning and Zoning Commission participated in some of the preliminary activities leading up to the enactment by the city of the alley-closing ordinance. He says that the commission could not legally participate in a closing activity, but that it held hearings or meetings of which the owners of property abutting on the alley were not given notice, and that the trial court permitted the commission's report to be introduced in evidence and gave some consideration to it. The record shows that the only function performed by the Planning and Zoning Commission in this case was to obtain agreements from utilities for the movement of service lines, and that the "report" to which appellant objects merely stated that the commisison had obtained the necessary agreements and that it had no objection to the closing. We cannot see how the participation could have had any effect upon the determination that the closing of the alley would accomplish a public purpose.

The judgment is affirmed.

All concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1538

WILLIAM E. BARTH, - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE, A Municipal Corporation;
ELI BROWN AND SONS, INC.; and
D. H. ROBINSON AND
E. F. RECTENWALD, - - - - - *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

OPINION OF THE STATE COURT.

The decision of the Court of Appeals of Kentucky on the appeal from the Jefferson Circuit Court was rendered and filed November 21, 1969, and is reported in 449 S. W. 2d 24.

A Petition for Rehearing was filed December 19, 1969, and was denied without a written opinion on February 6, 1970.

II.

JURISDICTION.

(A.) Petitioner's Statement of Jurisdiction is defective in that it does not comply with United States Supreme Court Rule 23(1)(b)(i and ii), 28 U.S.C.A. Petitioner has failed to show: (i) the date of the judgment sought to be reviewed and the time of its entry, and (ii) the date of any order respecting a rehearing.

(B.) Petitioner has attempted to invoke the jurisdiction of this Court to review the judgment in the Court of Appeals of Kentucky by writ of certiorari under 28 U.S.C. § 1257(3). Respondent submits that the statute does not confer jurisdiction in this situation.

(1.) *The judgment sought to be reviewed is not a final judgment.* 28 U.S.C. § 1257 provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed. . . ." The appeal from the Jefferson Circuit Court to the Court of Appeals of Kentucky did not end the litigation in the state courts. After the Court of Appeals of Kentucky affirmed the lower court, the action was transferred from the Chancery Branch to the Common Pleas Branch of the Jefferson Circuit Court for a jury trial on the question of compensation to be paid petitioner and the other objecting landowner, all pursuant to the judgment of the Jefferson Circuit Court, Chancery Branch, entered October 2, 1968 (Appendix D, Item 1). The trial of this action is now scheduled for June 16, 1970. Until the question of

compensation has been decided by a jury, as directed by the state statute in question, Kentucky Revised Statute (hereinafter KRS) 93.360, the rights of the parties have not been fully litigated. The state courts have not finally disposed of the whole matter in controversy and further proceedings at the trial level are necessary. After the jury verdict and judgment on the question of compensation, petitioner will have an opportunity to appeal the judgment to the Court of Appeals of Kentucky. At the present time, all possibilities afforded by state procedure for review by all state tribunals have not been exhausted. Any review by this Court at this time is premature.

(2.) *No federal question has been preserved for review.* The petition does not show that the constitutionality of the Kentucky alley closing statute was timely and properly raised so as to give this Court jurisdiction to review the judgment of the state court on writ of certiorari. Nor does it affirmatively appear from the record that any federal question was properly presented for decision to the Court of Appeals of Kentucky. Petitioner referred, in general terms, to the protection of the Fourteenth Amendment to the Constitution of the United States in his Amended Answer in the court of first instance (Record, p. 57) and in his Motion to Strike Specific Parts of Findings of Facts and Conclusions of Law (Record, p. 65) and in his Statement of Points on Appeal (Record, p. 85). Petitioner, in his brief to the Court of Appeals of Kentucky, referred to the Fourteenth Amendment to the Constitution of the United States only one time, *i.e.*,

where he summarized the nine defenses contained in his Amended Answer filed with the court of first instance (Brief for Appellant to Court of Appeals of Kentucky, page 12). At no point in his appellate brief did petitioner question the constitutionality of the Kentucky statute or present any argument that the statute was repugnant to the Constitution of the United States. The decision of the Court of Appeals of Kentucky, rendered November 21, 1969, makes no reference to the Constitution of the United States or any other federal question (Appendix D, Item 3). Petitioner also failed to raise a federal question or present argument in his Petition for Rehearing filed in the Court of Appeals of Kentucky. Petitioner, in his Reply to the City of Louisville's Response to his Petition for Rehearing, again mentioned generally the Fourteenth Amendment to the Constitution of the United States in summarizing the earlier pleadings (Appellant's Reply to Response by the City of Louisville, p. 2), but failed to present any argument that KRS 93.360 was in violation of the Constitution of the United States.

There is not even a showing by petitioner that the decision of the Court of Appeals of Kentucky necessarily involved the determination of a federal question. This Court has enunciated a policy of not considering questions not presented to or decided by courts below. This Court stated in *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 60 S. Ct. 670, 84 L. Ed. 849:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should

> lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. 309 U. S. at 434."

See also, *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 2, 60 S. Ct. 375, 84 L. Ed. 536; *McQuade* v. *Inhabitants of the City of Trenton,* 172 U. S. 636, 19 S. Ct. 293, 43 L. Ed. 581.

Presentation of a federal question to the state court and its decision of the question are essential for jurisdiction to obtain in this Court:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch* v. *People of the State of New York,* 293 U. S. 52 at 54, 79 L. Ed. 191 at 193."

Petitioner in his Amended Answer in the court of first instance invoked only in general terms the protection of the Fourteenth Amendment, but did not make any specific allegation or any arguments of any conflict between the Kentucky statute and the federal Constitution at any stage of the proceedings in the Court of Appeals of Kentucky. Respondent submits that by failing to do so petitioner lost his privilege of further review.

III.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

Was the Court of Appeals of Kentucky correct in applying the law as found in *Henderson* v. *City of Lexington,* 132 Ky. 390, 111 S. W. 318, and affirming the judgment of the Jefferson Circuit Court upholding the action taken by the City of Louisville?

Respondent submits the answer to this question is YES.

IV.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

No statutes, constitutional provisions or rules other than those mentioned above or other than those cited by petitioner are directly involved in this proceeding. Respondent submits that KRS 93.100, KRS 416.120 and KRS 65.010, cited by petitioner, are inapplicable to the question before this Court.

V.

STATEMENT OF THE CASE.

The facts material to the consideration of the Petition for Certiorari are contained in petitioner's brief under the headings "Opinions of the State Courts" (pages 2-5) and "Statement of the Case" (pages 14-23). Respondent urges, however, that many of the facts presented are not pertinent to the question which this Court is called upon to decide at this time. In addition, petitioner has included in his Statement of the Case argument on the merits, conclusions and his interpretations of the law, none of which respondent undertakes to affirm or contradict at this time. Respondent, however, does not wish to be understood as intending to waive the right to add to or contradict such Statement of the Case should certiorari be granted.

Petitioner's Statement of the Case is defective in that it does not comply with United States Supreme Court Rule 23 (f), 28 U.S.C.A. Petitioner does not in his Statement of the Case specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court. Petitioner has failed to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari, as is required by said Rule 23 (f).

VI.

REASONS RELIED UPON FOR DENIAL OF WRIT AND SUMMARY OF ARGUMENT.

Respondent contends that the Petition for Writ of Certiorari should be denied for the following reasons:

(A.) Review at this time would be premature. The court of first instance has not yet tried the question of damages. Damages, if any, must be determined by a jury and paid to each objecting landowner, or into court, before the court can direct the closing of an alley. KRS 93.360(3). The court of first instance has scheduled the trial on the question of damages for June 16, 1970. Until damages have been ascertained and the portion of the alley closed, the judgment is not final for purposes of review.

(B.) No federal question was presented to the Court of Appeals of Kentucky.

(C.) Petitioner has requested a writ of certiorari to the Court of Appeals of Kentucky and to the Jefferson Circuit Court. The Jefferson Circuit Court is the court of first instance and not the highest court of Kentucky to consider this case. Hence, under 28 U.S.C. § 1257, its judgment is not reviewable by certiorari.

(D.) The questions sought to be raised herein are not of sufficient substance, importance or gravity to require granting the writ. United States Supreme Court Rule 19(1)(a), 28 U.S.C.A., provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will

be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which, will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Petitioner has failed to show any "special and important reasons" for granting the writ and that there exists a "federal question of substance".

(E.) Petitioner's arguments are without merit:

(1.) KRS 93.360 does not violate the Fourteenth Amendment to the Constitution of the United States. The statute provides a method whereby owners of land may be compensated for any diminution in the market value of their property caused by the closing of the public way. The statute expressly conditions the closing upon *payment* of the compensation so determined by jury. Because petitioner did not specify his constitutional objections to the state statute, respondent is unable to answer his objections in any detailed analysis, but, respondent submits that the closing pursuant to KRS 93.360 results in neither a deprivation of property without due process of law or unequal protection of the laws.

(2.) The decision of the Court of Appeals of Kentucky is completely in accord with the law in Kentucky. In *Henderson* v. *City of Lexington,* 132 Ky. 390, 111 S. W. 318, the Court of Appeals of Kentucky inter-

preted and upheld an earlier statute regulating the closing of public ways in smaller class cities. The statute interpreted in that decision and KRS 93.360 are substantially identical in language and exactly identical in effect.

(3) Petitioner's third argument concerns the medium of payment of compensation determined by the jury. Petitioner raises this question for the first time in this Court. He did not present this question in the Court of Appeals of Kentucky and should not be entitled to raise it now. In any event, since KRS 93.360(3) expressly conditions the closing of a public way "upon payment to each defendant of the damages awarded to him", petitioner's argument becomes moot.

VII.

CONCLUSION.

This action involves the closing of an alley by the City of Louisville and payment to the objecting landowners of compensation as prescribed by state statute. The court of first instance allowed petitioner to attempt to prove that the closing did not serve a public purpose. He failed to prove a lack of public purpose and appealed to the highest court in Kentucky. The appellate court affirmed and the action is now back in the court of first instance to be tried on the question of damages.

Petitioner has confused the status of the action by citing inapplicable statutes and arguing cases that are valid but have no application to the present facts. His

argument is not convincing that further review is important. Only in the court of first instance did he assert rights generally under the Constitution of the United States, but failed to specify where the circumstances of this action deprived him of any rights. He has shown no error.

In view of the often announced policy of this Court to exercise sparingly the power of certiorari, respondent respectfully submits that this case is not of the character for which certiorari should be granted, and that, therefore, petitioner's request for such a writ should be denied.

Respectfully submitted,

JAMES E. THORNBERRY,
Director of Law,
City of Louisville,
Room 200, City Hall,
Louisville, Kentucky 40202,

Attorney for Respondent, City of Louisville.

CERTIFICATE OF SERVICE.

The undersigned certifies that he has served this RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon all parties required to be served by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to the following: Felix J. Sanders, Jr., Attorney for Equitable Federal Savings & Loan Association, 209 South Fifth Street, Louisville, Kentucky, 40202, Blakey Helm, Attorney for William E. Barth, Jr., 606 Louisville Trust Bldg., Louisville, Kentucky, 40202, Mr. Thomas James, Attorney for William E. Barth, Jr., Kentucky Home Life Building, Louisville, Kentucky, 40202, Mr. D. H. Robinson, Attorney pro se and for Edward F. Rectenwald, 310 West Liberty, Louisville, Kentucky, 40202, Mr. Marshall P. Eldred, Jr., Attorney for Eli Brown and Sons, Inc., 231 South Fifth Street, Louisville, Kentucky, 40202, this 3rd day of June, 1970.

James E. Thornberry